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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 5.3.2007

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THE HON'BLE MR.JUSTICE P.D.DINAKARAN
AND
THE HON'BLE MRS.JUSTICE CHITRA VENKATARAMAN

T.C.(A).No.65 of 2004

Commissioner of Income Tax-III
Coimbatore. .. Appellant

Vs.

M/s.Kongarar Spinners Ltd.,
Kalayamputhur, Palani Taluk. .. Respondent

Appeal under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'B' Bench dated 25.7.2003 made in ITA No.376/Mds/1996 for the assessment year 1990-91 against the Order of the Commissioner of Income Tax [Appeals], Coimbatore dated 27.12.1995 in ITA.No.680-C/94-95 for the assessment year 1990-91, against the order of the Deputy Commissioner of Income Tax, Special Range II, Coimbatore dated 31.3.1993 and 26.8.1994 in GIR.C.T-9389/SR.II/CBE.

For Appellant : Mr.T.Ravi Kumar for M/s.K.Subramaniam.
For Respondent : No appearance

J U D G M E N T

(Delivered by P.D. DINAKARAN, J.)

This appeal is directed against the order of the Income Tax Appellate Tribunal dated 25.7.2003 made in ITA.No.376/Mds/1996 for the assessment year 1990-91, raising the following substantial question of law:

> "Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that while computing the book profit under Section 115J of the Income Tax Act, the unabsorbed depreciation/ business loss of earlier years should be taken without adjusting the profit earned in some of the intervening years against the loss of other years?"

2.1. The assessee company is engaged in the business of manufacture of yarn. The assessment was completed under Section 143(3) of the Income Tax Act (for brevity, "the Act") computing taxable income at NIL and book

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profits under section 115J of the Act at Rs.26,70,467/-. Finding there was a mistake in the assessment order in the computation of profits under Section 115J, viz., the unabsorbed losses were taken at a higher figure, as furnished by the assessee, without considering the profits earned by the assessee in the earlier years, notice under Section 154 of the Act was issued. The assessee objected to the proposed rectification on the ground that loss or depreciation whichever is less as per the books should be taken and the working given by the assessee is correct. The Assessing Officer, not satisfied with the objections of the assessee reworked the unabsorbed depreciation/ business loss and determined tax under Section 115J of the Act at Rs.4,86,034/-.

2.2. On appeal by the assessee, the Commissioner of Income Tax (Appeals) reworked the unabsorbed depreciation / business loss giving partial relief to the assessee, accepting their contention that adjustments of profits for the assessment years upto 1982-83 against the loss/depreciation from a subsequent period, viz., 1983-84 is improper, and the same was on appeal, at the instance of the Revenue, confirmed by the Tribunal. Hence, the present appeal raising the substantial question of law, referred to above.

3. Heard the learned Standing Counsel for the appellant. There is no representation on behalf of the respondent/assessee.

4. The learned Standing counsel for the Revenue submitted that the issue involved in this appeal is answered in favour of the Revenue by the decision of this Court in CIT v. FAB EXPORTS PVT. LTD., [2002] 258 ITR 56.

5. In CIT v. FAB EXPORTS PVT. LTD., [2002] 258 ITR 56, this Court held as under:

> "Section 115J of the Income-tax Act, 1961, is a special provision relating to certain companies. Section 115J(1) requires the total income of the company, to which that section may become applicable, to be "as computed under this Act in respect of any previous year relevant to the assessment year. . .". By declaring in sub-section (2) that nothing contained in sub-section (1) will affect the determination of the amounts in relation to the relevant previous year to be carried forward to the subsequent year or years under section 32(2), section 32A(3), section 72(1)(ii), section 73, section 74, section 74A(3) or section 80J(3), Parliament has made it clear that the determination of the amounts to be carried forward is to be made in the normal way by applying the provisions of the Act as if section 115J(1) had not been applied to the concerned assessee. The term "affect" in sub-section (2) of section 115J does not imply only an effect which is detrimental. The term "affect" here does not seek to confer a benefit on the assessee nor does it seek to deprive the assessee of any benefit available to the assessee under the Act. It seeks to build as it were, a wall, between what is to be determined in relation to the sections

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mentioned in sub-section (2) and what has been provided for in sub-section (1). **The reference to "previous year" in sub-section (2), in the context, can only refer to every previous year in which the assessee seeks to carry forward the loss and other adjustable sums. The carry forward is a process which proceeds in a continuum. The amount to be carried forward in the succeeding year being based upon the amount carried forward at the commencement of the year, and the further loss or other adjustable amounts, if any, that the assessee may be entitled to add to that carried forward figure. The Act does not in any of its provisions visualise interruption in this process or suspending a part of the continuum and treating the adjustment as not having been made, even when the computation would show that the profits in a particular year were sufficient to have all the carried forward losses and other amounts set off against that figure of profit. The amount that can be carried forward is not required to be recomputed for the years following the year in which section 115J(1) ceased to apply.** Such a set off is not to be deemed to have not been done nor can a set off so done be ignored after the last of the assessment years to which section 115J(1) applied.

...

The plain words of section 115J(2) are that the determination of the amount in relation to the previous year to be carried forward to the subsequent year under the provisions referred to therein shall not be affected by anything contained in sub-section (1). These words are clear enough. **The fact that a part of the income, which is set off against the carried forward loss and depreciation even when, as a result of such set off, is not available for being taxed, is nevertheless deemed to be available for taxation to the extent of thirty per cent of the book profit, cannot therefore result in the assessee becoming entitled to carry forward the extent of the loss which could not be utilised for reducing the burden of taxation by setting off the same against the profits being carried forward to a succeeding assessment year or years."**

(emphasis supplied)

6. In view of the above well settled law, we find that the first appellate authority as well as the Tribunal erred in holding that while computing the book profit under Section 115J of the Act, the unabsorbed depreciation/business loss of earlier years should be taken without adjusting the profit earned in some of the intervening years against the loss of other years. The question of law referred for consideration is

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answered in favour of Revenue and against the assessee. This appeal is allowed. No costs.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

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To:

1.The Assistant Registrar,
Income Tax Appellate Tribunal
Madras Bench "B", Chennai.

2.The Secretary, Central Board
of Direct Taxes, New Delhi.

3.The Commissioner of Income
Tax (Appeals), Coimbatore.

4.The Commissioner of
Income Tax, Coimbatore.

5.The Deputy Commissioner of
Income Tax, Special Range-II
Coimbatore.

+ 1 CC To Mr. N.Muralikumaran, Senior Standing Counsel for Income Taxm, SR NO.13585

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